UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

PRIME HEALTHCARE SERVICES-GARDEN GROVE, LLC d/b/a GARDEN GROVE HOSPITAL & MEDICAL CENTER

and Case 21-CA-39031

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. Procedural History

On August 4, 2010, Administrative Law Judge Jay R. Pollock ("ALJ") issued his decision in this matter, making findings of fact and conclusions of law that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by rescinding the reserve sick leave policy available at Garden Grove Hospital & Medical Center. Respondent filed exceptions to the ALJ's decision, and a brief in support, challenging the ALJ's findings, credibility resolutions, and legal conclusions.

II. Introduction

The following facts are undisputed: on July 1, 2008, Respondent, Prime Healthcare Services-Garden Grove LLC d/b/a Garden Grove Hospital and Medical Center, purchased and began operating an acute care facility called Garden Grove Hospital & Medical Center ("the Hospital"). Service Employees International Union-United Healthcare Workers-West ("Union") represents employees in two units at the Hospital: Combined Service, Maintenance, Technical, Skilled Maintenance and Business Office Clerical Unit ("Service Unit") and Professional Unit (hereinafter collectively referred to "Unit employees").

After purchasing the Hospital, Respondent allowed employees to continue to accrue and use reserve sick leave as they did under the previous owner. On April 17, 2009, over 9-months after its purchase, Respondent sent Unit employees a memo rescinding reserve sick leave and rescinding all reserve sick leave accrued after July 1, 2008. Respondent did not give the Union notice of the memo or what was going to occur. Unit employees informed the Union of the change.

By engaging in the conduct above, the ALJ concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union about rescinding the reserve sick leave benefit. For reasons described more fully below, the ALJ's findings and conclusions are supported by the record evidence and Board law. Respondent's exceptions are without merit and should be rejected.

III. Issues Presented

1. Did the ALJ act within his discretion by crediting Respondent's uncontradicted testimony and then drawing reasonable legal conclusions?

2. Since Respondent was a successor, did it have a duty to give the Union notice and an opportunity to bargain about changes to reserve sick leave?

3. Did the ALJ err in finding a past practice when Respondent provided a benefit to employees for 9-months and then rescinded that benefit without giving the Union notice and an opportunity to bargain?

4. Does the Union's failure to file a charge at another Hospital evidence that the current unfair labor practice lacks merit?

IV. Statement of Facts

Respondent stipulated to being a successor to Tenet Health Care Corporation (Tenet). Jx. 2.[1] On July 1, 2008, Respondent stipulated that it purchased the Hospital from Tenet. ALJD 2:24; Jx. 2. Prior to Respondent's purchase of the hospital, Tenet had a collective-bargaining agreement with the Union. ALJD 2:21–23; Jx. 2. This collective-bargaining agreement reflected the Union's status as the 9(a) representative for employees. Jx. 2.

During Tenet's ownership, it entered into a collective-bargaining agreement with the Union for a term of 2007 until 2011. ALJD 1:23. Under Tenet's ownership, Unit

[1] Through the remainder of this brief, all citations to the transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's exhibits will be referred to as "GCx." followed by the appropriate number. The brief will refer to Respondent's exhibits as "Rx." followed by the appropriate number. The brief will refer to Joint exhibits as "Jx." followed by the appropriate number. The brief will refer to Respondent's Exceptions as "Res. Exc." followed by the appropriate number. The brief will refer to Respondent's Brief as "RB." followed by the appropriate page number.

employees enjoyed a reserve sick leave benefit. ALJD 1:31. This reserve sick leave benefit provided that full-time employees accrued 1.85 hours of reserve sick every pay period and part-time employees accrued .92 hours of reserve sick leave per pay period. ALJD 1:31–36. Unit employees continued to accrue and use reserve sick leave after Respondent assumed ownership and operations of the Hospital. ALJD 2:31–36; Tr. 88; Jx. 1; Jx. 2; GCx 3.

a. Respondent Set Initial Terms and Conditions of Employment

Respondent set initial terms and conditions of employment before it assumed control of the Hospital. ALJD 1:34–36. Respondent, however, did not discuss the change to reserve sick leave with the Union. ALJD 2:35–36; Tr. 240. Respondent presented Allen Stefanek ("Stefanek") to testify concerning when he "communicated with Antonio Orea at SEIU-UHW regarding initial terms and conditions of employment at Prime Healthcare—Garden Grove."[2] Tr. 227. When Stefanek was asked "[d]id you have any discussion with Mr. Orea about the reserve sick leave plan?" He responded that "I did not have any discussions." Tr. 240. While failing to notify the Union of the change to reserve sick leave, Respondent informed Unit employees of its intentions at "Employee Forums." ALJD 2:38–39. Respondent provided no documents that explicitly rescinded the reserve sick leave benefit.

b. Respondent Operates the Hospital and Allows Employees to Accrue and Use Reserve Sick Leave

Despite what might have occurred at Employee Forums, after Respondent assumed control and began operating the Hospital, Unit employees continued to accrue reserve

[2] Antonio Orea worked for the Union at the time of the Respondent's purchase of the Hospital, but now works for a rival labor organization seeking to represent employees at the Hospital. Tr. 37–41; GCx. 1(m). No evidence was presented to show Orea is favorably disposed to the Union.

sick leave as they did under Tenet. ALJD 2:31–3:2. No party disputes from July 1, 2008, until April 17, 2009, each Unit employee pay stub showed reserve sick leave accrual and usage. Jx. 1; Jx. 2; GCx. 3; Tr. 88. No party disputes that Unit employees accrued and used reserve sick leave after Respondent purchased the Hospital. Jx. 1; Jx. 2; Tr. 88.

Well after July 1, 2008, when Respondent purchased and began operating the Hospital, an employee, Rosanelli Phan ("Phan"), used reserve sick leave in March and April 2009. Tr. 80–95; GCx. 3(h); GCx. 3(i). Phan informed her supervisor that she wanted to use reserve sick leave and the supervisor decided the amount of hours Phan would use each pay period. Tr. 94. A portion of the reserve sick leave she used was accrued subsequent to Respondent's purchase of the Hospital. Tr. 80–95; GCx. 3(h); GCx. 3(i). Her use of reserve sick leave in March and April 2009 followed the same reserve sick leave procedure she had used in 2006 and 2008 under Tenet. Tr. 82, 84; GCx. 2.

Respondent's witnesses also confirmed employees continued to accrue and use reserve sick leave after July 1, 2008. Tr. 167–168; 199. No evidence exists on the record to show that when Unit employees accrued and used the reserve sick leave after July 1, 2008, they were informed that this was a mistake. Rather, Unit employees continued to accrue and use the reserve sick leave benefit as was the practice before the sale. Tr. 80–95, 131, 132; GCx. 2; GCx. 3.

c. Respondent Cancels Reserve Sick Leave

No parties dispute that, after allowing accrual and usage of reserve sick leave for 9-months, at that time, the whole tenure of Respondent's ownership of the Hospital, Respondent cancelled reserve sick leave without first notifying the Union. ALJD 3:2–7.

On April 17, 2009, Respondent notified Unit employees of this change through a memo that informed them that the reserve sick leave benefit would no longer accrue and that benefit, which accrued after July 2008, would be rescinded. ALJD 3:3–5.[3]

The ALJ recognized Respondent "mistakenly" allowed Unit employees to accrue reserve sick leave. Nevertheless, the ALJ found that Respondent still "had a duty to bargain with the Union" when it rescinded the reserve sick leave policy because the bargaining obligation had attached to what the ALJ characterized as either sick leave or miscellaneous wages. ALJD 4:35–6:32; 6:42–43.

V. Argument

a. The ALJ's Failure to Grant an Adverse Inference

Respondent Exception Number 1 excepts to the ALJ's failure to grant an adverse inference for General Counsel's failure to call a Union representative with personal knowledge of the setting of initial terms and conditions of employment at the Hospital. Respondent argues that General Counsel's failure to call such a witness should have caused the ALJ to infer that "the testimony of those at the Union with personal knowledge of the initial terms and conditions of employment or bargaining would have contradicted the unfair labor practice charge." RB. 10.

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[3] The pertinent part of that memo reads as following:

> A mistake was made while setting up the employees of Garden Grove Hospital following the sale of the hospital to Prime Healthcare Services. The error was allowing the reserve sick accrual to continue after July 1, 2008.
>
> Garden Grove Hospital will honor the reserve policy with respect to any accrued balances as of June 30, 2008. However, after July 1, 2008 the accrual of 1.85 hours per pay period for full-time employees and .92 hours for part-time employees was supposed to end. The payroll department has corrected this error for all Garden Grove employees. As a result, you may see a change in the Reserve Sick balance on your paystubs. The balance will reflect any accrued sick as of June 30, 2008 less hours taken since July 1, 2008 only. Any hours accrued since July 1 has been removed. Jx. 1.

Respondent Exceptions Number 1, 3, 4, 6, 7, and 8 object to the ALJ's failure to credit Respondent's witnesses regarding the setting of initial terms and conditions of employment. They also except to the finding that Respondent did not notify the Union about changes to the reserve sick leave. Respondent further argues General Counsel must prove its case by a preponderance of the evidence; and, by failing to provide contradictory testimony to Respondent's version of the setting of initial terms and conditions of employment, General Counsel failed to prove its case.

First, General Counsel's theory of the case does not rest on what occurred during the setting of initial terms and conditions of employment. Rather, General Counsel argues, and the brief elaborates further below, that Respondent's bestowal of reserve sick leave *every pay* period for 9-months established reserve sick leave as a term and condition of employment. This eliminated the need to discuss what occurred during the setting of initial terms and conditions of employment.

Furthermore, Respondent presented Allen Stefanek to testify about the setting of the initial terms and conditions of employment. He was the person who presented the initial terms and conditions of employment to the Union. Regarding the setting of initial terms and conditions of employment and reserve sick leave, Stefanek was asked "[d]id you have any discussion with Mr. Orea about the reserve sick leave plan?" He responded that "I did not have any discussions." Tr. 240. Thus, the record was clear: when Respondent presented the initial terms and condition of employment to the Union representative, nothing was said about reserve sick leave.

After consideration of the entire record, the ALJ decided against drawing an adverse inference. An ALJ has no obligation to draw an adverse inference. "An adverse inference

'may be drawn,' not must be drawn, and 'the decision to draw an adverse inference lies within the sound discretion of the trier of fact." *Tom Rick Buick*, 334 NLRB 785, 786 (2001)(citations omitted); *see also AEi12, LLC*, 343 NLRB 433 (2004).[4]

b. Respondent Had a Duty to Bargain

Respondent Exception Number 9 objects to the ALJs conclusion that Respondent had a right to set initial terms and conditions of employment, but had a duty to bargain once Respondent employed a majority of Tenet's employees. The Supreme Court has long held that a successor employer is free to set initial terms and conditions of employment for employees. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). After assuming operations and setting initial terms, a successor must bargain with the incumbent union regarding any subsequent changes it wishes to make to terms and conditions of employment. *Id.* at 280–81, 291, 294, 295; *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). No doubt exists that Respondent is a successor under the Act. Respondent's bestowal of reserve sick leave for 9-months made it a term and condition of employment. Thus, regardless of what occurred when setting initial terms and conditions of employment, Respondent had a duty to provide the Union notice and an opportunity to bargain before rescinding reserve sick leave.

[4] Respondent also seeks an adverse inference because the Union allegedly failed to produce documents about the setting of initial terms and conditions of employment. Tr. 39, Line 39. However, the Union produced all the documents available to it. Tr. 37–42. As previously discussed, General Counsel's theory rests on the development of a past practice, not what occurred during the setting of initial terms and conditions of employment. Furthermore, the ALJ provided a resolution that would allow Respondent to enter any documents in to the record that it believed relevant and would have allegedly been produced through the subpoena. Tr. 37–42. In addition, Respondent's witness, Stefanek, addressed the extent to which any conversation Respondent had with the Union concerning reserve sick when setting initial terms and conditions of employment. For those reasons, Respondent's second exception should be rejected.

c. Past Practice Required Respondent Bargain with the Union

i. Respondent Developed a Past Practice of Bestowing Reserve Sick Leave

Respondent Exception Number 13 objects to the ALJ's finding that reserve sick was a past practice. Respondent argues that Unit employees had no reason to think that reserve sick leave would continue to accrue because they were allegedly informed during the setting of initial terms and conditions of employment that reserve sick leave would stop. Recently, the Board explained that to establish a past practice it must be shown that the practice occurred " 'with such regularity and frequency that employees could reasonably expect [it] to continue or reoccur on a regular and consistent basis.' " *Regency Heritage Nursing and Rehabilitation Center*, 353 NLRB No. 103 (2009)(*citing Sunoco*, 349 NLRB 240, 244 (2007)). In addition, the Board explained that the party asked to honor the practice be aware of its existence. *Id.* (*citing BSAF Wyandotte Corp.*, 278 NLRB 173, 180 (1986)).

1. Reserve Sick Leave Occurred on a Regular and Consistent Basis

Respondent argues that Unit employees had no reason to think that reserve sick leave would continue to accrue. Respondent's argument ignores the stipulated facts. Respondent offers nothing to rebut the ALJ's finding that Unit employees accrued reserve sick leave under Tenet. Respondent also specifically stipulated Unit employees accrued reserve sick leave *every pay period* for 9-months after it acquired the Hospital. ALJD 6:25–26. Respondent fails to present evidence showing that *after* it assumed ownership and control of the Hospital and Unit employees continued to accrue reserve sick leave, Unit employees were told or understood that such benefit would stop. Thus,

Respondent's actions gave employees the impression that they "could reasonably expect [reserve sick leave] to continue or reoccur on a regular and consistent basis." *Sunoco*, 349 NLRB 240, 244 (2007).

Respondent claims though employees knew reserve sick leave would stop because of Employee Forums. Respondent Exceptions Number 5, 8, 12, and 14 claim the ALJ failed to find Respondent notified employees of the change to reserve sick leave. This argument rests on Respondent's contention that, *before* it assumed ownership and control of the Hospital, multiple Employee Forums were held that informed Unit employees of the change to reserve sick leave. Respondent exceptions object that the ALJ did not credit those Employee Forums. Such an argument completely ignores the ALJ's decision.

Specifically, the ALJ states that initial terms and conditions of employment were set with the Union, but nothing was said to the Union about reserve sick leave. ALJD 2:34–36. The ALJ immediately continues, stating "[w]hile Respondent informed the unit employees, in June 2008, of its intentions through "Employee Forums," Respondent did not formally notify the Union of this change. However, due to clerical errors, from July 1, 2008 to April 17, 2009 the employees continued to accrue the reserve sick leave benefits for every pay period during this time." ALJD 2: 38–3:2. [5] Thus, even though Respondent exceptions intimate otherwise, the ALJ credits Respondent that Unit employees were told reserve sick leave would stop accruing. Accordingly, contrary to Respondent's assertions, the ALJ decision makes clear that the ALJ did find that

[5] Respondent Exception 15 objects that the ALJ failed to find accrual of the reserve sick leave was a clerical error. This exception ignores the ALJ's findings of fact. The ALJ stated specifically "due to clerical errors, from July 1, 2008 to April 17, 2009 the employees continued to accrue the reserve sick leave benefit for every pay period during this time." ALJD 2:39–3:2. The ALJ did not stop there. The ALJD states at least four times that the accrual of reserve sick leave was a mistake. *See* ALJD 6:22, 25, 28, 43. Therefore, regardless of the finding that the Respondent seeks, the ALJ still found Respondent violated Section 8(a)(5) of the Act.

employees were informed of the change to reserve sick leave.[6] Regardless of this finding, the ALJ found that a past practice developed, which obligated Respondent to give the Union notice and an opportunity to bargain about any change to reserve sick leave. ALJD 6:36–43.

Respondent also argues that reserve sick leave's continual accrual during a 9-month period represents insufficient time to establish a past practice. Respondent cites dictum of a non-controlling case to support this proposition. *See Palm Beach Metro Transportation, LLC*, (2010) NLRB Lexis 81, *21. In *Palm Beach Metro Transportation*, an ALJ, after explaining that the employer did not show the fluctuations of employee hours occurred regularly and consistently, dismissed an employer defense stating three years represents an insufficient time to establish a past practice. While the ALJ in *Palm Beach Metro Transportation* commented such in passing, the rule for a past practice states that a past practice develops when something occurs with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular basis. The Board has never set an amount of time required to establish a past practice though.

In the current facts, accrual of reserve sick leave was like clock work: every pay period Unit employees accrued more reserve sick leave and were always allowed to use it. Respondent's 9-month bestowal of reserve sick leave represents more than enough time to develop reasonable expectation of continuance or reoccurrence.

2. Respondent Was Aware of Reserve Sick Leave

Despite the regular and consistent occurrence of reserve sick leave, Respondent still tries to disprove the existence of a past practice by citing *Exxon Shipping Co.* 291 NLRB 489 (1988). Respondent also cites *City of Kansas.* (1995) 104 LA 710, 716. While

[6] *See* ALJD 2:34–3:2

Respondent tries to substantiate the awareness portion of the past practice test with these cases, they are not controlling.

Respondent cites to *Exxon Shipping Co.* because in that case, the Board considered whether union officials had developed a past practice of requesting, and the employer granting, permission to participate in government investigations. 291 NLRB 489 (1988). Thus, in *Exxon Shipping Co.*, the past practice was the very act of requesting and granting permission to participate in a governmental investigation. The Board did not use the requesting and granting permission as the yardstick to decide if a past practice developed. Rather, the Board in *Exxon Shipping Co.* considered whether an "established practice" or "long standing practice" was in place. *Id.* (citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Chef's Pantry*, 274 NLRB 775 (1985), *Brotherhood of Locomotive Firemen*, 168 NLRB 677, 680 (1967)). Respondent's citation to *City of Kansas* does not control. That case was not before the Board.

In relying on those cases, each over at least a decade old, Respondent provides no explanation as to why they should control over *Regency Heritage Nursing and Rehabilitation Center*. 353 NLRB No. 103 (2009). In *Regency Heritage Nursing and Rehabilitation Center*, the Board articulated the requirements for establishing a past practice. Since *Regency Heritage Nursing and Rehabilitation Center* is the most recent Board explanation of what constitutes a past practice, it should control and not the cases cited by Respondent.

3. Reserve Sick Leave is a Mandatory Subject of Bargaining

Respondent's Exception Number 10 and 11 objects to the ALJ's finding that reserve sick leave is the same as regular sick leave and that reserve sick leave was a mandatory

subject of bargaining. Respondent twists the ALJ's conclusion, stating that the ALJ found reserve sick leave was "the same as a regular sick leave and, thus, a mandatory subject of bargaining." RB. 16. However, the ALJ's decision states that reserve sick leave can be classified as sick leave, in which case it would be a mandatory subject of bargaining. ALJD 5:5–9.

The ALJ states that reserve sick leave can also constitute "a separate or extra benefit," which qualifies as miscellaneous wages and thus a mandatory subject of bargaining.[7] ALJD 5:13–22. The ALJ then correctly cited other miscellaneous benefits that were classified as wages and mandatory subjects of bargaining. *See, e.g., Seafarers Local 777 (Yellow Cab Co.) v. NLRB*, 603 F.2d 862, enfg. in part, 229 NLRB 1329 (1977) (drivers being allowed to take their taxi cabs home at night); *AT&T Corp.*, 325 NLRB 150 (1997) (paycheck-cashing services); *Florida Steel Corp.*, 230 NLRB 1054 (1977) (reimbursement rates for lodging and meal expenses and use of credit cards by employees); *Master Slack Corp.*, 230 NLRB 1054 (1977), enfd., 618 F.2d 6 (6th Cir. 1980) (allowing employees to purchase goods on layaway); *Gratiot Comty. Hosp.*, 312 NLRB 1075 (1993), enfd. in relevant part, 51 F.3d 1255 (6th Cir. 1995) (longstanding practice of employer issuing and laundering uniforms).

The ALJ explained that whether these miscellaneous benefits become mandatory subjects of bargaining is impacted by the duration of the past practice of providing the benefit. *Gratiot Comty. Hosp.,* 312 NLRB 1075 (1993). In the cases cited above, employers took similar positions as the Respondent does here, and those positions were

[7] Respondent tries to distort the ALJ's decision giving the impression that the ALJ held that reserve sick leave is either classified as reserve sick leave and thus a mandatory subject of bargaining. Or, reserve sick leave is an extra and separate benefit and therefore not a mandatory subject of bargaining. However, the ALJ's decision states that reserve sick leave is either sick leave and a mandatory subject of bargaining or an extra and separate benefit, but still a miscellaneous employee benefit that qualifies as wages and a mandatory subject of bargaining.

rejected by the Board. As explained above, because Unit employees accrued and used reserve sick leave every pay period for 9-months, Unit employees reasonably expected the practice to continue or reoccur on a regular basis. Moreover, reserve sick leave was a substantial benefit. As can be seen from Rosanelli Phan's testimony, reserve sick leave provided employees the means to receive pay while employees were sick for an extended period of time. Thus, since it was a material and substantial benefit, Respondent had a duty to notify the Union and provide an opportunity to request bargaining. *Litton Systems*, 300 NLRB 324 (1990).[8]

ii. The Union's Reasons for Filing the Charge Does Not Affect the Merits of the Charge

Respondent Exception Number 16 objects to the ALJ's failure to find that the Union did not file an unfair labor practice charge at the Encino Hospital where the reserve sick leave was also discontinued as evidence that there was no unfair labor practice at the Hospital. Respondent avers that charge should be dismissed because the Union has only chosen to file a charge at the Hospital to block a representation petition from a rival Union. A party is free to file or not file an unfair labor practice at the facilities of its choosing. Unfair labor practices are judged on their merits; they are not judged on what motivated the filing of the unfair labor practice. Accordingly, arguments that seek dismissal of unfair labor practices solely based on what motivated the Charging Party fail.

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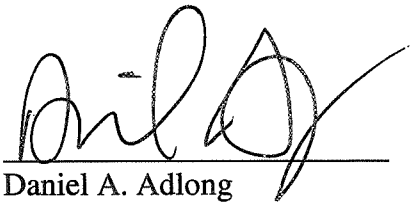
[8] Respondent also argues that since reserve sick leave was not in the collective-bargaining agreement, it does not constitute a mandatory subject of bargaining; that argument ignores Board precedent. The Board has long held that an employer is not relieved of the duty to bargain in good faith about revising or eliminating a practice even though it is not embodied as an express term of its labor agreement. *Dearborn Country Club*, 298 NLRB 915 (1990). Thus, despite allegedly not appearing in the collective-bargaining agreement, Respondent needed to notify and bargain with the Union upon request before unilaterally rescinding reserve sick leave.

Based on all the above, Respondent's decision to rescind reserve sick leave on or about April 17, 2009, without notifying the Union and providing an opportunity to bargain violated Section 8(a)(1) and (5) of the National Labor Relations Act.[9]

VI. Conclusion

Based on the record evidence, the ALJ's credibility resolutions, and established Board precedent, the General Counsel respectfully submits that Respondent's exceptions are without merit and should be rejected.

Respectfully Submitted,



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[9] Thus, so to should the Board dismiss Respondent Exception Number 17, 18, and 19 which except to the finding of a violation of Section 8(a)(1) and (5); the ALJ's remedy; and the ALJ's order, respectively.

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions** in Case 21-CA-39031 was submitted by E-filing to the Offices of the Executive Secretary of the National Labor Relations Board on October 13, 2010. The following parties were served with a copy of the same document by electronic mail.

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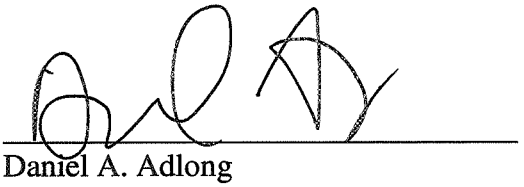

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